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**Pennant Foods Company, a wholly owned subsidiary of CS Bakery Holdings, Inc., a wholly owned subsidiary of Chef Solution Holdings, LLC and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO.** Cases 34-CA-11195, 34-CA-11196, 34-CA-11209, and 34-CA-11251

June 27, 2006

#### DECISION AND ORDER

BY MEMBERS LIEBMAN, KIRSANOW, AND WALSH

On January 19, 2006, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief. The General Counsel and the Charging Party also filed cross-exceptions and supporting briefs to which the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.

#### AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 6:

"6. Since on or about June 7, 2005, the Respondent has violated Section 8(a)(3) and (1) by failing and refusing to reinstate Toporovsky and Borukhovich to their former positions of employment."

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Pennant Foods Company, a

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening unfair labor practice strikers with permanent replacement if they refused to abandon the strike.

<sup>2</sup> We shall modify the judge's conclusions of law to conform to his findings.

Wholly Owned Subsidiary of CS Bakery Holdings, Inc., a Wholly Owned Subsidiary of Chef Solution Holdings, LLC, North Haven, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. June 27, 2006

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Wilma B. Liebman, Member

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Peter N. Kirsanow, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Margaret Lareau, Esq.*, for the General Counsel.

*Gary Glaser, Esq.* and *Paul Galligan, Esq. (Seyfarth Shaw, LLP)*, for the Respondents.

*Thomas Meiklejohn, Esq. (Livingston, Adler, Pulda, Meiklejohn & Kelly)*, for the Charging Party.

#### DECISION

#### STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on November 1, 2, and 3, 2005,<sup>1</sup> in Hartford, Connecticut. The consolidated complaint herein, which issued on August 31, was based upon unfair labor practice charges and an amended charge filed on May 24 and 26, June 10, August 17 and 19, by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO (the Union). The complaint alleges that Pennant Foods Company, a wholly owned subsidiary of CS Bakery Holdings, Inc., a wholly owned subsidiary of Chef Solution Holdings, LLC<sup>2</sup> (the Respondent), issued written warnings to employee Jack Toporovsky on May 9 and 12, and removed his access to his laptop computer and all telephones from the maintenance department, in violation of Section 8(a)(1) and (3) of the Act. The complaint further alleges that from on about May 24 to about June 6, Toporovsky, Gregory Borukhovich, Karl Straba, and Harry Patel ceased work concertedly and engaged in an unfair labor practice strike, and that the Respondent threatened them with permanent replacement if they refused to abandon the strike, and has refused to reinstate Toporovsky and Borukhovich to their former positions of employment, despite their unconditional offer to return to work, in further violation of Section 8(a)(1) and (3) of the Act.

<sup>1</sup> Unless indicated otherwise, all dates referred to herein relate to the year 2005.

<sup>2</sup> The Respondent's name, as amended at the hearing.

## FINDINGS OF FACT

## I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

## III. THE FACTS

A. *Background*

For a number of years, the Union has been attempting to organize the Respondent's production employees at its facility in North Haven, Connecticut (the facility). There was a Board-conducted election and some settlement agreements, but the Union has never been certified by the Board, or recognized by the Respondent, as the collective-bargaining representative of these employees. This case involves the Respondent's maintenance employees only, at the time, approximately nine in number. The three maintenance employees most active in the Union's organizing were Toporovsky, Borukhovich, and Straba. On May 9, the Respondent issued a written warning to Toporovsky and subsequently removed a computer from his work station as well as the telephones from the maintenance department. Counsel for the General Counsel alleges that the Respondent engaged in this conduct because of Toporovsky's Union and other protected concerted activities. The Respondent defends that Toporovsky was given this warning because he used the company computer during working hours for personal use. Toporovsky was given another written warning on May 12, allegedly for inadequately inspecting a metal detector prior to requesting a service call for the detector. Beginning on May 24, Toporovsky, Borukhovich, Straba, and Patel engaged in a strike at the facility that ended on about June 6, when they made unconditional offers to return to work. Counsel for the General Counsel and counsel for the Charging Party allege that this was an unfair labor practice strike; counsel for the Respondent defends that it was an economic strike. It is further alleged that upon their offer to return, the Respondent refused to reinstate Toporovsky and Borukhovich to their former positions of employment by putting them on the second shift rather than the first shift where they had previously been employed, and made other changes to Toporovsky's terms of employment. No affirmative remedy is requested for Patel, who is satisfied with his poststrike shift and schedule, or for Straba, who resigned at the conclusion of the strike.

Respondent defends generally that it hired Jim Richards on May 2 as its new maintenance manager to correct the inefficient operation of the maintenance department at the facility, and that it was Richards' attempt to correct past habits in the department, and to operate the department in an efficient manner, rather than any union or concerted activities, that resulted in the events of May 9 through 12.

Richards testified that during his interviews for employment with the Respondent, and prior to May 2, he was told of the

lack of efficiency and accountability in the maintenance department, the down time of the equipment and problems with documentation of time, but without any specific mechanics being named. He was also asked:

Q. Were you given any information or told anything during the pre-hire process leading up to your starting on May 2 of '05 about any union organizing efforts in the past?

A. That there was an ongoing corporate campaign.

Q. That's what you were told?

A. Yeah.

Q. Any . . . [.]

A. Whatever that means.

Q. Anything else besides that?

A. No.

Q. Were you given any details about that?

A. No.

Q. Did you know what union, if any, was involved in that?

A. No.

Q. Were you given the names of any specific individuals at the plant that had been involved in that process?

A. No. Absolutely not.

On cross-examination, Richards testified that it was while he was interviewed by Price at the facility, the "corporate campaign" was mentioned:

Q. And what did he tell you the corporate campaign consisted of?

A. That was it.

Q. No. What did he . . . do you know what a corporate campaign is?

A. No, I don't.

Q. Did you ask him what it was?

A. No, I didn't.

Q. He just said that there was a corporate campaign involving the union. He didn't explain anything at all?

A. Correct.

During his first few days of employment at the facility, Richards observed that when an electrical issue came up on the plant floor, the mechanics stopped what they were doing and waited for Toporovsky to come to fix the problem. He also noticed that Toporovsky spent too much time at his work station, rather than on the plant floor, and that when Toporovsky was not on the plant floor repairing a machine, he was at his desk with his laptop computer. When Richards approached him, Toporovsky closed the computer and said that he was working on a timesheet or a spread sheet, and Richards told him to go down to the plant floor. Shortly after his employment at the facility began, Richards met with Toporovsky and told him that he wanted to build a team at the facility, that there should be no difference between electricians and mechanics, that: "Everybody will do everything." He told Toporovsky that he was to cover the floor for 8 hours, rather than spending time at his desk.

### B. The May 9 Warning

Rosa DeLauro is a Congresswoman from Connecticut. She wrote a letter to the editor in the May 8 edition of the New Haven Register entitled: "Companies Continue To Use Illegal Anti-Union Tactics." In the letter, she states, *inter alia*, that she supports the Employee Free Choice Act and:

It was the situation in one of our businesses in this area that led me to reaffirm our basic laws and employee rights.

North Haven-based Chef Solutions was charged with 29 violations by the National Labor Relations Board for coercion, threats of deportation, physical assault and death threats against employees trying to organize.

She concludes by stating that the Employee Free Choice Act ". . . provides common-sense changes to our labor law that make sure our traditional employee protections remain real."

Toporovsky testified that on the morning of May 9 he was approached at the facility by Borukhovich, Straba, and other mechanics who asked him if he read DeLauro's letter in the New Haven Register the prior day. He said that he had not, but that as he had access to the internet on his office computer, he would bring up the article later that day, when he had time. He initially testified that sometime between 12 and 1 that day, he pulled the article from the internet and forwarded it to Richards' printer (in the adjoining office) because he wanted Richards to read the article. He later testified that this could have occurred during his breaktime that day, but regardless, it was on his "personal time." He testified that when he brought up the article on his computer, Borukhovich was looking over his shoulder, although Toporovsky did not mention that in his affidavit given to the Board. About 5 or 10 minutes after forwarding the article to Richards' printer, he went to Richards' office and asked him if he got the article that he forwarded to him. Richards said that he did get the article and that Toporovsky would get a warning for it. Later that day, Toporovsky was given an employee disciplinary report entitled written warning for violation of company rules of conduct. The time of incident is stated as noon. The warning states that Toporovsky was using his company computer and printing personal items in Richards' office. Toporovsky's comment was that he sent the article at a time when he was working on the work timesheets. When Richards gave him the warning, he told him that he was not allowed to use the computer and printer for personal matters, and that is why he was given the warning.

Borukhovich testified that when he arrived for work on May 9, Straba asked him if he saw the letter from DeLauro in the newspaper. He said that he hadn't seen it, but that they should talk to Toporovsky about it. When he saw Toporovsky, he told him about the DeLauro letter and Toporovsky said that he would find the letter either during his lunch or his break. Sometime later that day, either during lunch or a break, Toporovsky showed him the letter on his computer. Borukhovich's affidavit given to the Board states that on the morning of May 9 he told Toporovsky of the DeLauro article and Toporovsky told him that he would locate the article on his computer at lunchtime. Borukhovich's affidavit does not mention seeing the article on Toporovsky's computer. Later in the day, Toporovsky told him that Richards gave him a warning for

printing the letter from his computer to Richards' printer. Borukhovich asked Toporovsky why he sent the letter to Richards' printer, and Toporovsky said, "He's a new manager in the company. I want to let him know what's going [on] in the company." Straba testified that he told Toporovsky about the DeLauro article, and Toporovsky told him that he would check it out later in the day when he had time.

Richards testified that sometime between 10:30 a.m. and noon on May 9, while he was sitting in his office, his printer began to print something even though he had not been using it at the time. He got up to see what was being printed and, as he walked to the printer, Toporovsky walked into his office. Richards took the article out of his printer and saw the heading at the top was New Haven Register, without looking at it further: "I didn't read any of the text." He asked Toporovsky if he had printed it off the internet, and Toporovsky said that he had, and that it was an article about the company and he wanted to share it with Richards. Richards told him that he didn't understand how Toporovsky can use the company's equipment on the company's time for personal use: "You know you can't do that." Toporovsky said that the company was mentioned in the article and he wanted to talk to him about it. Richards said, "I don't have time for this. You're going to get a write up. You can't use company equipment on work time doing personal things." Toporovsky then walked out of his office. Richards testified that the only thing he read from the article was the name New Haven Register; he did not read any of the text of the article. He was uncertain whether he tore up the article or returned it to Toporovsky who took the article with him when he left Richards' office. The written warning<sup>3</sup> states the time of occurrence was noon. Richards testified that was the time he returned to his office and actually wrote the warning. Toporovsky's timecard states that on May 9, he clocked in at 6:53 a.m., punched out for lunch at 1:39 p.m., returned at 2:03, and left for the day at 3:22. Received in evidence was an e-mail dated February 14, containing Valentines Day wishes from Toporovsky to many female employees at the facility, including Maria Giaimo, Respondent's human resources representative at the facility. Further, the parties stipulated that pursuant to a subpoena request from counsel for the General Counsel, the Respondent could locate no warnings given to employees for the personal use of telephones, fax machines, computers, or other equipment for the period January 4 to May 9, 2004.

It is next alleged that on about May 10, the Respondent removed Toporovsky's access to his laptop computer and removed all telephones from the maintenance department, in violation of Section 8(a)(1) and (3) of the Act. Richards testified that Toporovsky's desk is adjacent to his office and he would often see him using the computer or be on the telephone.

<sup>3</sup> The employee disciplinary report used by the Respondent provides for either a verbal warning, written warning, final warning, suspension, termination, or other. Richards gave him a written warning for the May 9 incident. On cross-examination, Richards testified to a situation where he issued an employee a verbal warning on May 6, after he had received a warning on January 20, and a final warning on April 20, and another employee who he gave a verbal warning on May 5, and another verbal warning on May 6. He testified that "The progressive discipline is relative to the infraction."

When Richards questioned him about the use of the computer, he responded that he was checking on, or ordering, parts. In addition, when he saw the other mechanics on the telephone on the downstairs desk, when he asked what they were doing, they responded that they were ordering parts. On May 9 he saw Borukhovich on the telephone and asked him whether it was business or personal, and he said that it was personal. When Richards told him that he should hang up and call on his break or at lunchtime, on his cell phone, he asked Richards, "How am I going to call my wife?" Richards said that he didn't know, but he would have to make personal calls on his phone and on his time. At that time, he decided to take Toporovsky's laptop and the department's telephones, and put them in his office. After reviewing the timesheets maintained by the Respondent, he realized that there was no way that these mechanics were spending so much time on the telephone on business-related telephone calls, and that is why he removed the telephones from the area. He testified further, that on May 11 he saw that the laptop computer and telephone that he removed from Toporovsky's desk were back on Toporovsky's desk. He asked Toporovsky if he had taken them back, and he said that he had. Richards told him that he was going to keep them in his office, and if Toporovsky needed them, he could come into his office and use them, but he wanted him to spend more time on the production floor, rather than at his desk. When asked whether he took the laptop computer from Toporovsky's desk because of the DeLauro article incident of the prior day, he testified: "Absolutely not . . . It's because it was no longer needed for his job."

Borukhovich testified that he has used the telephone at the facility to order parts and has also used it for personal calls; for "a few minutes in the morning" during his breaktime he called his elderly parents. On an occasion during the period in question, although he could not testify whether it occurred before or after the above-mentioned warning to Toporovsky, while he was on the shop phone, Richards asked him if it was a business or a personal call and he said that it was a personal call. Richards told him no more personal calls on that phone. If he wanted to make a personal call, he should do it on his cell phone or the phone in the lunchroom on his break. After that, whenever he wanted to use the Respondent's computer or telephone, he had to ask permission of Richards. Prior to that, the only restriction that he knew of regarding the use of the computer was not to use it for pornography. Previously, he used the computer during his lunchtime to look for Russian jokes or items about the city in Russia where he had lived. Straba testified that prior to May 9, there was a "loose policy" about not using company telephones for personal calls. After Toporovsky's computer was removed from his desk, the telephones became a "big issue."

Toporovsky testified that on May 10, when he arrived for work, the computer and telephone were removed from his desk. In addition, three telephones in the maintenance department were also removed. He asked Richard Price, the plant director, why the computer and telephone were taken from him, and Price told him, "What's the difference between you and the production employees? They don't have telephones." He testified that prior to this occasion, he and the other maintenance

employees used the telephones to order parts for the machinery at the facility, because it was faster than placing an order through the mail. "Most of the time. 99%," the employees used the telephone for business purposes. When they used the telephone for personal use they had never been criticized for it. On occasion, he has used his computer for personal purposes, when he has the time, or on his time.

There was some testimony regarding work rules at the facility. The Respondent's work rules are distributed to employees. Toporovsky acknowledged receiving them when he was hired in June 2004. Some of the "Minor Violations" listed in the work rules are: personal telephone calls received during working hours, except in the case of emergencies or with permission, handling personal activities during working hours, without authorization, and unauthorized solicitation or collections on the premises, except as permitted by the National Labor Relations Act. Toporovsky testified that although he remembers signing something when he began working for the Respondent, he does not remember any rule prohibiting personal activities on worktime or the use of the company telephones for personal use.

### *C. The May 12 Metal Detector Warning*

On May 12, Toporovsky received another written warning for an incident that occurred on May 9. The warning states:

On or around 5/9/05 Jack as our electrician was supposed to trouble shoot metal detector failure. He never tested or diagnosed other than removing touch screen & smelling something burnt he came to me to order new touch screen and had them install. 5/10/05 Lock came out, it was not touch screen & Jack said he didn't test, he smelled.

The Respondent employs metal detectors to be certain that there is no metal in any of their bread products. The bread is on a conveyor belt that passes through the metal detector head, which detects any metal in the bread. There is a screen (or monitor) at the side of the head that is used to program the metal detector with a keypad. Toporovsky testified that on May 9 he was told that one of the metal detectors at the facility was not working. When he went to check it, he saw that the screen was dark, indicating that the power was not reaching the detector. When he checked the control box adjacent to the detector, it showed that the power was there. He then removed the four screws on the screen and opened it up and noticed a burning smell. He then put the screws back on and went to see Richards. He told him that he could not determine what was wrong with the detector and that he should contact the Lock Company, which manufactured and serviced the metal detectors, to come to repair the machine in question. He did not tell Richards that he checked the power supply and that it was operating properly. Because Richards had only been employed at the facility for a week, Toporovsky gave him the telephone number and the individual with whom he should speak at the Lock Company. He testified that he didn't make any further attempt to repair the metal detector himself because he does not have a wiring diagram of the metal detector, they do not have spare parts for the metal detector, and there are about 18 cables involved. Additionally, the Lock Company has always repaired

the metal detectors at the facility.

Richards testified that on May 9, after hearing that the metal detector was not working, he sent Toporovsky to look at it. Toporovsky returned and told him that he smelled something burning, and that he should call Lock and have a serviceman come to the facility to fix it, and that he should bring a new circuit board with him because he thought that the problem was a burnt circuit board.<sup>4</sup> Toporovsky testified that he never told Richards about any particular item that should be ordered. Richards then called Lock, asked to schedule a service call as soon as possible, and to bring a circuit board because he thought that theirs was burned. After the service man arrived, Toporovsky told Richards that the service man was still working on the problem, but that it wasn't the circuit board. Richards then became "a little concerned" that the Respondent would have to pay for the circuit board, and he asked the technician, who said that since he installed the circuit board, the Respondent would not be charged for it. Richards then asked to speak to Toporovsky, ". . . and that's when I found out . . . that the trouble shooting boiled down to him removing head and smelling something burned and putting it back together and asking me to have service come out." The warning he gave Toporovsky states that it was given for "substandard work." Richards testified that the warning was not given due to his inability to repair the metal detector:

Substandard work is ordering something and not determining what the cause is. The reason electrical components are not returnable is because if you put an electrical component in and it shorts out again because you haven't found the problem it's non-refundable . . . after talking with him after it was found that the board was not the issue and finding out that this ultimately boiled down to this smell test, that's just not acceptable for a lead mechanic or the supposed electrician person there who had done all of the work to be able to diagnose that way and have me order parts. I can't afford with the budget to pay for everyone to come out all the time without any diagnosis of what the problem is.

When asked what he would have expected Toporovsky to do, Richards testified:

As with any piece of equipment, there's trouble shooting that is how you determine what's wrong. You determine that there's power coming from the wall to the plug. There's power going through the plug. There's power getting from the plug through the cord. There's power getting from the wall plug cord power supply head . . . it's a sequence of events. . . [.]

Because of proprietary reasons, they [Lock] don't give schematics. The trouble shooting process, again, you follow the sequence of events until you get to where you think the problem might be. You then, at that point, call the manufacturer and say I've got eighteen wires coming

out that I've got power input. I don't know what my power output is . . . how do I test the board. They don't . . . disclose any proprietary information. They give you a step by step instruction, test this, test this, you should get this, you should get that and call me back.

You go through that procedure and you call him back. At that point, they will either have something else for you to try to tell you that there's nothing else that you can do in the field that you need to send it in.

He testified that after speaking with Toporovsky, he determined that he performed no diagnosis on the metal detector.

Walter Army, who is employed by Lock Inspection Systems as the service and quality manager, testified that Lock manufactured the metal detectors used at the facility. He described that metal detector as rectangular shaped with a conveyor belt going through the opening in the middle. On the right side is a display, called a pod, with a keyboard containing three buttons. An 18-conductor cable comes out of the unit into a stainless steel box, which holds the power supply, which plugs into the wall outlet. He identified the work order that was generated by Lock after receiving the service call from the Respondent on May 9. The work order gives the name of Lock's technician who did the call, and states that that the Respondent stated that the problem was with the unit's display. The service order also indicates the spare parts that the technician took with him to the facility. If the Respondent had ordered a specific part when it made the initial service call, that part would be listed on a separate part order. Army could not locate a part order for this call. The technician went to the facility on May 11 and reported that the unit had no display, and that some lights on the power supply were blinking, indicating that there was a problem with the power supply. On the following day, the technician returned to the facility and replaced a part, but that did not correct the problem. The other possible problem, the oscillator, could not be replaced on site, so it had to be sent to Lock to be repaired. When the unit was examined at the Lock facility, it was determined that the oscillator board inside the head had shorted out and burned. That would produce a burning odor when it malfunctioned. Army was asked how Respondent's employees could check on whether the electrical current was properly getting through the eighteen wires to the metal detector:

Q. And would you need anything, any information to be able to check those wires?

A. Yeah. You need a wiring diagram with the voltages on it.

Q. Is there a wiring diagram in the manual that's supplied with this piece of equipment?

A. There's a wiring diagram, but it doesn't show any voltages.

Q. Without that wiring diagram with voltages, could an on-site electrician or technician be able to check those 18 items?

A. You could go and check them, but, how would you know what it's supposed to be, unless somebody says, on this pin I should have 15 volts, because if you had eight volts. . . [.]

Q. That would be meaningless?

<sup>4</sup> Counsel for the General Counsel, in her brief, argues that Richards' testimony in this regard varied from whether Toporovsky told him to "order" the part or to have the Lock technician "bring" the part. Because I have credited the testimony of Toporovsky over that of Richards, it is not necessary to examine the words used that carefully.

A. Well, you wouldn't know whether that's correct or not.

Q. All right. And without that capability, if someone were to open this unit and smell a burning smell and not have the wiring diagram, what would you expect them to do?

A. If they opened it and smelled the burning, I would expect them to shut it off immediately.

Q. Okay. And then, would you expect them to service it on their own, or contact the company, or do something else?

A. Well, if they didn't have schematics or drawings or wiring diagrams, I would expect they'd call our people.

Q. You referred to schematics. Do you supply those to your customers?

Q. No, we don't.

The total cost of the service calls for the metal detector was \$1,164, but Lock only charged the Respondent \$1000.

#### *D. The May 17 Photocopy Incident*

Sometime between May 15 and 17, Toporovsky, Borukhovich, Straba, and Patel prepared a document in English and Spanish that said:

To Questor-Chef Solutions and Richard Price

Stop harassing us and giving out warnings for no reason! Stop trying to divide the people. We will not stop speaking up to make this a better and safer place to work. We are sticking together.

This document was signed by Toporovsky, Borukhovich, Straba, Patel, and a number of other production and maintenance employees. On about May 17, Toporovsky and Straba were at the photocopy machine prior to 7 a.m. making copies of this document. Toporovsky testified that they initially had difficulty with the copier, but he was able to get it to copy the document. As they were walking away from the copier, Richards approached them and asked to see the document, but Straba refused to show it to him. Toporovsky told Straba to show it to Richards and after seeing it, Richards brought them in to see Price. Straba testified that they were having trouble getting the copier to work, when Richards walked by and tried to help them with the copier. When Richards arrived, Toporovsky took the petition out of the copier and gave it to Straba, who put it in his pocket. Richards asked to see it and Straba refused to give it to him. Richards said that he had to show him the document because he was his supervisor and, when Straba refused, Richards took them to Price's office, and Straba gave Price the document. Richards testified that prior to the start of work on that day, he observed Toporovsky and Straba at the copying machine, and they appeared to be having some difficulty getting it to work properly. He offered to help, but they declined his help. He asked Toporovsky what they were copying, and Toporovsky took it out of the copier and gave it to Straba, who stuffed it in his shirt. Richards asked what it was, and they said it was a personal item. Richards said that he wanted to see it and Toporovsky told Straba to give it to him. Richards "... glanced at it and said that we need to go

talk to Richard Price. . . [.]” He did not read the document, nor does he recall what it was. Straba and Toporovsky were not given a warning for this incident. Richards testified that there were two differences between this incident and the May 9 incident with the newspaper article that Toporovsky transmitted to his printer. The May 17 incident involving Toporovsky and Straba occurred before the beginning of the shift, so they were on their own time. Also, because the shift change was approaching, Richards was too busy to handle it, so he referred the matter to Price.

Borukhovich testified that about a day before this incident at the photocopier, he had a conversation with Richards in his office. Richards asked him if somebody asked him to throw rocks into somebody's window, would he do it? Borukhovich answered that it depended whose window. If it was his enemy, no problem, he can do it. About a day or two later, after the photocopier incident, Richards approached him in the shop and said, “Yesterday you told me that you wouldn't throw rocks, and you just threw a rock.” Borukhovich responded, “This rock is not in your window. It was somebody else.” These conversations are not mentioned in his affidavit given to the Board, and Richards testified that he never made such statements.

#### *E. The Strike*

Toporovsky, Borukhovich, Straba, and Patel went on strike beginning May 24, and Toporovsky, Borukhovich, and Straba made unconditional offers to return on June 6. It is alleged that the Respondent failed to reinstate Toporovsky and Borukhovich to their former positions of employment by returning them to the second shift on June 7, rather than the first shift where they had previously been employed, and by making changes to Toporovsky's terms of employment.

There were three meetings that the employees had with the Union prior to the commencement of the strike. The first meeting was on May 12; the second and third meeting were on about May 20 and 22. The meetings were lead by union organizer Peggy Shorey, who testified that she received telephone calls from Toporovsky and Borukhovich on May 11 saying that the maintenance employees were angry at what was happening at the facility and were planning to go on strike. She said that they should meet at the earliest possible time to discuss the issues and their rights in more detail, and they met on the following day. Toporovsky, Straba, Patel, and one other employee, not Borukhovich, were present. The employees spoke about the lack of respect that they received, as well as the fact that all of a sudden they were receiving warnings that were not deserved. She explained the difference between an economic strike and an unfair labor practice strike: the former is solely about working conditions or pay or benefits, while an unfair labor practice strike refers to the company having violated the employees' labor rights through unfair labor practices. She encouraged the employees to give the Union some time to investigate the issues in order to obtain more information before they began the strike. She said that she would consult with the Union's legal department about the issues, but, in the meantime, they should continue acting as a group. Toporovsky testified that from four to six employees, including Borukhovich,

were present at this meeting. The employees said that they needed the Union to protect them and expressed a fear of losing their jobs. They also spoke about the warnings that they received and Shorey said that she would speak to other people in the Union about the situation, but that she would need more information from the employees to know whether they might qualify as unfair labor practice strikers. Straba testified that at this meeting the workers spoke about the warnings and harassment at work.

The next meeting of employees took place on about May 20. About eight employees, including Toporovsky, Borukhovich, and Straba were present. Two other union representatives, Julie Kushner and Jose Melara, were also present. Shorey testified that since some employees who were there had not been at the first meeting, the union representatives explained the difference between an economic strike and an unfair labor practice strike. They also told the employees that, based upon what they told Shorey at the first meeting, the Union believed that the Respondent had committed unfair labor practices. Toporovsky spoke again about his computer being removed and how that affected his job and about his May 9 and 12 warnings, and other employees also spoke about warnings that they had received that they felt were retaliatory. The employees also mentioned the fact that the telephones were removed from the department. Toporovsky, Borukhovich, and Straba said that they wanted to strike, and the union representatives told them that they believed that because unfair labor practices had been committed, it would be an unfair labor practice strike. The employees said that they felt that other employees might also be interested in striking, so they agreed to meet again on May 22. Shorey said that she would begin to prepare the picket signs for the strike. Toporovsky testified that at this meeting the main issue that the employees discussed was removing the warnings from their files, and he was one of the employees who spoke about that. He also complained about the fact that his laptop computer was taken away from him. Shorey said that she felt that if they went on strike it would be an unfair labor practice strike: "Unfair labor practice strike doesn't demand any economical demand. We didn't ask for raise our hourly rate or sick days or whatever. We ask for fair treatment." Shorey told them that the picket signs would mirror their requests and ask for the warnings to be removed from their files and that they should receive fair treatment. Borukhovich testified that at all the meetings Toporovsky spoke about how the Respondent was treating the employees, and the unfair warnings.

About seven or eight employees attended the final meeting, which took place on May 22. Kushner and Melara were also present, along with Shorey. Because some employees who attended had not been at the prior meetings, they again discussed the difference between an economic strike and an unfair labor practice strike, stating that they believed that unfair labor practices had been committed, giving Toporovsky's May 9 warning and the removal of the phones and the computer as an example. In the discussions at the three meetings, there was much talk about the unfair warnings that they had been given and the employees decided that they would begin the strike by giving a warning to Price, challenging his actions at the facility.

Shorey prepared the warning to Price later that day, e-mailed it to Toporovsky that evening, and gave a copy to the employees when they met the following morning.

Early in the morning of May 24, Toporovsky, Borukhovich, and Straba met with Shorey, who gave them the "warning" that they were to give to Price. The warning, signed by them, states:

**WRITTEN WARNING:**

We have requested many times that Questor/Chef Solutions stop the harassment and unfair treatment of all the employees. We will not stop speaking up to make this a better and safer place to work. Stop trying to divide the people, we are sticking together. We are writing you up for your continued unfair treatment of all of us.

Toporovsky, Borukhovich, and Straba were waiting for Price when he arrived for work that morning. Toporovsky told Price that they had a written warning to give him for harassing them, but Price refused to accept it. Toporovsky told Price that he would give the warning to his secretary, which he did a few minutes later. Toporovsky, Borukhovich, and Straba then began picketing on the public sidewalk adjoining the facility. They were later joined by Patel, who worked on the third shift. The picket signs that they, and other employees, carried stated, inter alia, in English and Spanish: "ULP STRIKE," "PROTECT IMMIGRANT WORKERS," "REMOVE THE UNFAIR WARNINGS," "NO MORE UNFAIR WARNINGS," and "ON STRIKE." Sometime later that day, the three, together with Shorey went to the Board's office in Hartford and filed charges with the Board.

Toporovsky, Borukhovich, Straba, and Patel were given identical letters by the Respondent; Patel on May 25, and the other three on May 24. The letters state:

Chef Solutions recognizes your right to engage in a strike or other protected concerted activity. However, please understand that the law also provides the Company with the right to continue its operations. This right includes the Company's right to hire permanent replacements for those who engage in an economic strike, in order to be able to continue its operations in support of its customers. Consistent with this, *please be advised* [emphasis supplied] that if you do not report for work, as scheduled, for the first shift tomorrow, Wednesday, May 25, 2005, then the Company may exercise its right to hire permanent replacements to fill your position. If a permanent replace [sic] is hired for your position, however, you will be placed on a preferential hiring list for reinstatement once your position becomes vacant.

The parties stipulated that on June 6 the Respondent received the following letter signed by Toporovsky, Borukhovich, and Straba: "We are returning to our former positions of employment without conditions. We are not giving up any of our rights. We will continue to fight against unfair treatment and abusive working conditions." Price called Toporovsky and Borukhovich separately to his office, and told each that the only position that he could offer them was the second-shift mechanic, effective the following day, and both Toporovsky and Borukhovich accepted these positions.

Although it is agreed that Toporovsky and Borukhovich were returned to the Respondent's employ on June 7, and that no affirmative remedy is requested regarding Straba and Patel, it is alleged that the Respondent failed to reinstate Toporovsky and Borukhovich to their former positions of employment, in violation of Section 8(a)(1) and (3) of the Act. Admittedly, they were reinstated on the second shift, rather than the first shift where they had been employed prior to May 24. Toporovsky testified to other changes in his terms of employment as well. None of these alleged changes were obvious and Toporovsky's testimony on this subject is not particularly clear. For example, he testified that after he returned, Richards told him to empty the contents from his desk and move everything to the locker room. In addition, prior to the strike, he wore a blue uniform like Richards. After he returned, he wore a mechanics uniform of dark blue pants and a blue shirt. Further, he testified about changes regarding his responsibilities with the yeast system at the facility, which had been "... constantly under my daily routine check list." On about July 7 or 8, he observed a contractor working on the CO2 system of the machine, and introduced himself. At that moment, Richards came by and said, "Do whatever you have to do, don't stay here." In addition, he was not allowed to use his computer to set up, and calibrate, the metal detector, as he had prior to the strike. Prior to the strike he had a role in repairing the mixers, which he usually did with his computer; after the strike he was not asked to perform this work. In about July, he was told to perform caulking work on the foundation, work which he had not previously performed for the Respondent. Borukhovich testified that when they returned, they initially met with Giamio, who told them to wait and that she would locate Price, who met separately with each of them. When Borukhovich met with him, Price told him that they were engaged in an economic strike, and Borukhovich told him, "No, it was an unfair labor practice strike." Price told him that the only opening that he had was on the second shift, and Borukhovich said that he would take it.

Richards testified:

Some of the issues that were part of Jack's routine no longer needed that labor time ... we'd addressed the cause ... and effect, and resolved the issue. Some of them needed a little tweaking right after he came back and we continued to tweak ... [.] So when Jack came back, the CO2 system was working great, colder than it's ever been. The flour system had been re-engineered and working better than it had ever been. The yeast system no longer had any issues. The mixers that were requiring a \$3,500 a piece part replacement for the touchscreen that required the laptop no longer needed to be done.

With these exceptions, his job after the strike was the same as when they first met in early May. He testified further that after the strike he asked Toporovsky to grease a machine and caulk some cracks in the building because an inspection report showed that it needed to be done.

#### IV. ANALYSIS

I found Richards to be a less-than credible witness. The reason for this finding is that I found certain of his testimony to be

illogical and not believable. He testified that when he was interviewed by the Respondent, he was told that the Union had an "ongoing corporate campaign" with the Respondent, but that he was not told what union was involved, was not given any details of the campaign, nor did he ask for any details, and didn't even know what it meant. He testified further, that on May 9, when Toporovsky printed the article on his printer, he never read the article other than seeing that it was from the New Haven Register, even though Toporovsky told him that it was about the company. Finally, on about May 17, when he observed Toporovsky and Straba at the photocopy machine attempting to copy the petition to Price, after demanding to see the document, he testified that he only glanced at it, did not read it, and cannot recall what it was. I find this testimony illogical and unreasonable because Richards knew that he was being hired to straighten out what was, allegedly, an inefficient department. It seems incredulous to me that in these three situations, Richards, or somebody in that situation, would show a lack of interest in the facts underlying the Union's corporate campaign, the contents of the letter on May 9, and the petition on May 17. It sounds like, "Hear No Evil, See No Evil, Speak No Evil." It therefore appears to me that he has tailored his testimony to make it appear that he had no knowledge of the union campaign at the facility, or of Toporovsky, Borukhovich, or Straba's participation in it. An additional reason for discrediting Richards relates to his testimony about the metal detector warning. In that regard, he testified that Toporovsky told him to order a new control board, yet Lock's record show no such order.

The May 9 incident is fairly straightforward, and generally uncontroverted. When his fellow employees told him of the DeLauro article in the May 8 newspaper, Toporovsky went onto his company-owned computer, located the article on the newspaper's website, and forwarded it to Richards' printer. There are, however, credibility issues in two areas: was Borukhovich with Toporovsky at his computer when Toporovsky was looking at the DeLauro article, and was Toporovsky on working time when he located the article and sent it to Richards' printer. I do not believe that either of these findings is necessary to a finding of whether the May 9 warning violated the Act, but I would find that Borukhovich was not with him when he located the article. There are two reasons for this finding. First, neither Toporovsky nor Borukhovich's affidavit refer to Borukhovich's presence at the time and, more importantly, with a new stricter supervisor at the facility, I find it unlikely that Borukhovich would be with Toporovsky at his desk, rather than being on the floor, where Borukhovich knew Richards would want him to be. Because there is no solid evidence one way or the other as to whether Toporovsky located and forwarded the article to Richards on working or nonworking time, other than Richards' testimony that the incident occurred about 10:30, which could have been a mid-morning break, I would credit Toporovsky and find that it occurred during his breaktime. However, even if he forwarded the article to Richards' printer on working time, that would not negate the protected nature of his actions.

Toporovsky was given a written warning by Richards on May 9 after he forwarded DeLauro's article to his printer. Richards testified, and the warning states, that he gave

Toporovsky this warning for using the company printer and printing personal items in Richard's office. Counsel for the General Counsel alleges that Toporovsky's actions on that day constituted protected concerted activities, and union activities, and that the warning therefore violated Section 8(a)(1)(3) of the Act. Based upon all the evidence herein, I find that Toporovsky was given this warning due to the contents of the May 9 article forwarded to Richards, rather than the fact that Toporovsky used the company computer to send it to Richards' printer. Toporovsky had been employed by the Respondent for 14 months and had previously received only one warning for wearing a watch in a work area. No other employee has received a warning for a similar transgression in, at least, the prior 16 months, and Toporovsky e-mailed Valentines Day greetings to female employees, including Giaimo, 3 months earlier, without a problem. In addition, there appears to be disparate treatment in that two other employees with more immediate warnings were only given verbal warnings, while Toporovsky got a written warning. These facts, together with the fact that I did not find Richards to be a credible witness, convinces me that Toporovsky was given the May 9 warning not simply because he used the company computer, but because of the contents of the DeLauro article. The issue therefore is whether this transmittal constituted protected concerted activities.

This is not the usual situation where employees were warned or were otherwise penalized for talking among themselves about a union or otherwise improving their working conditions. In this situation, after other employees told him of the DeLauro article, which referred to the country's labor laws, and her allegation that the Respondent had been violating these laws, Toporovsky forwarded this article to Richard's printer. In *Eastex, Inc. v. NLRB*, 437 U.S. 556, at 565-568, the Supreme Court stated:

We also find no warrant for petitioner's view that employees lose their protection under the "mutual aid or protection" clause when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. . . . [.] Thus, it has been held that the "mutual aid or protection" clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause.

In *Meyers Industries*, 281 NLRB 882, 885 (1986), after a court remand, the Board decided to adhere to the definition of concerted activities set forth in *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), stating that that definition was ". . . expansive enough to include individual activity that is connected to collective activity, which lies at the core of Section 7." The Board, at 885, stated further: "to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." The Board further stated, at 886: "When the record evidence demonstrates group activities, whether 'specifically authorized' in a formal agency sense, or

otherwise, we shall find the conduct to be concerted." Even though I have found that Toporovsky was alone in his office when he forwarded the DeLauro letter to Richards' printer, his actions were concerted for a number of reasons. Other employees had previously notified him of the article and the article referred to the Respondent and its labor relations policy toward its employees. As Administrative Law Judge James Rose stated in *Compuware Corp.*, 320 NLRB 101, 103 (1995): "The fact that an employee may act alone during some phase of concerted presentation of employee grievances does not mean he is thereby outside the protection of the Act."

Two other cases warrant note here. In *Blue Circle Cement Co.*, 311 NLRB 623 (1993), an employee was discharged for using her employer's photocopying machine to copy a publication that criticized her employer's plan to burn hazardous waste as a fuel at its facility. Even though only the discriminatee was observed using the photocopy machine, the Board found that her actions constituted concerted activities, and her discharge violated Section 8(a)(1) of the Act, stating: "the actions in question were a logical outgrowth of the multiple efforts of Saunders and the Union to oppose the Respondent's plan to burn hazardous waste." In *St. Joseph's Hospital*, 337 NLRB 94 (2001), a nurse was given a warning for programming on her computer the screen saver: "Look for the U." The Board found that the hospital routinely allowed other nurses to display a wide variety of personal, nonwork-related screen savers, and that by issuing a warning in this situation, the Board found that the employer violated Section 8(a)(1) and (3) of the Act. The Board also stated that in this situation, it was unnecessary to rely on an analysis under *Wright Line*, 251 NLRB 1083 (1980): "*Wright Line* is appropriately used in cases 'turning on employer motivation.' A *Wright Line* analysis is not appropriate where the conduct for which the employer claims to have disciplined the employee was protected activity."

I therefore find that the evidence establishes that the written warning that Toporovsky received on May 9 was due to the protected concerted and union activities of forwarding the DeLauro article to Richards' printer, and therefore violated Section 8(a)(1) and (3) of the Act. On that day or the following day, Richards took Toporovsky's computer from his desk and put it in his office. Because of the nexus between the above violation and the removal of the computer from Toporovsky's desk, I find that it violates Section 8(a)(1) and (3) of the Act. Richards also removed the telephones from the maintenance department at this time as well. The only certain situation that Richards could testify to involving the personal use of the telephones was the situation on May 9 when Borukhovich admitted that he was using the telephone on a personal call. On other occasions, when he saw Toporovsky and other mechanics on the telephone and questioned them about it, they claimed that they were ordering parts or were involved in some other business related conversation, which he didn't believe. As Richards had been employed by the Respondent for only 1 week, and as he removed the computer and telephones on the same day as, or the day after, the DeLauro article situation, I find that it was that situation, rather than the alleged improper use of company phones, that prompted Richards to remove the phones from the department, and find that this violated Section 8(a)(1) and (3)

of the Act.

The next allegation involves the May 12 warning given to Toporovsky, which I believe is the most glaring violation herein. The incident occurred on May 9, the same day as the DeLauro article incident. The credible testimony provides no support for Richards' decision to issue a warning to Toporovsky for the metal detector repairs. Richards testified to two principal reasons for giving Toporovsky the warning. One reason was that Toporovsky told him to have the service person bring a new circuit board with him and he was concerned that the Respondent would have to pay for the circuit board. However, I credit Toporovsky's testimony that he never told Richards to order any specific part. Additionally, Army, who was a totally disinterested and credible witness, testified that Respondent's records do not reveal any separate part order for a circuit board. And finally, Lock's technician told Richards that since he installed the circuit board (which was not the problem) the Respondent would not have to pay for it. This argument therefore appears to be totally illusory. Richards' other stated reason for the warning is that Toporovsky performed substandard work by not performing enough tests prior to calling the service employee from Lock. Although I am not knowledgeable about electronics, it appears to me that Toporovsky did all that he could do in order to properly analyze the situation. More importantly, Army feels the same way. Army was asked:

Q. . . if someone were to open this unit and smell a burning smell and not have the wiring diagram, what would you expect them to do?

A. If they opened it and smelled the burning, I would expect them to shut it off immediately.

Q. And then, would you expect them to service it on their own, or contact the company, or do something else?

A. Well, if they didn't have schematics [which Lock does not supply to its customers] or drawings or wiring diagrams, I would expect that they would call our people.

That is precisely what Toporovsky did. I therefore find that this warning was unwarranted and was pretextual in retaliation for his union and protected concerted activities, in violation of Section 8(a)(1) and (3) of the Act.

Toporovsky, Borukhovich, Straba, and Patel began a strike and picketing at the facility on May 24. Toporovsky, Borukhovich and Straba made an unconditional offer to return on June 6, and Toporovsky and Borukhovich returned to the second shift on the following day. No affirmative remedy is requested for Straba and Patel. Counsel for the General Counsel alleges that they were engaged in an unfair labor practice strike; Respondent defends that it was an economic strike. I have found that the Respondent violated Section 8(a)(1) and (3) of the Act by giving written warnings to Toporovsky on May 9 and May 12, and by removing the computer from his desk and by removing the telephones from the department on about May 9. The Board uses numerous phrases to determine whether a strike is an economic strike or an unfair labor practice strike. All look to the "subjective reactions" and the "state of mind of the strikers" in going on strike. *C-Line Express*, 292 NLRB 638, 639 (1989), and the effect of the unfair labor practices on the actions of the strikers. If it had "anything to do with" caus-

ing the strike it will be considered an unfair labor practice strike, *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145 fn. 5 (1995). Was it a "contributing cause" of the strike? *R & H Coal Co.*, 309 NLRB 28 (1992), or one of the causes of the strike, *Boydston Electric, Inc.*, 331 NLRB 450 (2000)? In making this determination, the Board does not calculate the relative severity of the unfair labor practices. In *Teamsters Local 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990), the court stated: "The employer's unfair labor practice need not be the sole or even the major cause or aggravating factor of the strike; it need only be a contributing factor. . . . [.] The dispositive question is whether the employees in deciding to go on strike, were motivated *in part* by the unfair labor practices committed by their employer, not whether without that motivation, the employees might have struck for some other reason."

No matter which of these tests is applied, it is clear that the strike that lasted from May 24 through June 6 was an unfair labor practice strike. The first union meeting occurred on the day that Toporovsky received his second written warning from Richards. The warnings were extensively discussed at the Union meetings and appear on the picket signs employed by the strikers. In addition, the symbolic gesture of giving Price a written warning to commence the strike illustrates the importance of that issue for the strikers. I therefore find that the strike engaged in by Toporovsky, Borukhovich, Straba, Patel, and, at times, others was an unfair labor practice strike.

It is further alleged that the letter that Respondent gave to the strikers on May 24 and 25 threatens them with permanent replacement if they refused to abandon the strike, in violation of Section 8(a)(1) of the Act. The first three sentences of this letter provides a correct interpretation of Board law, concluding by saying that the company can hire permanent replacements for those employees engaged in an economic strike. However, the rest of the letter, by assuming, incorrectly, that the employees were engaged in an economic strike, threatens the employees with permanent replacement if they do not report for work the following morning. In *Eagle Comtronics, Inc.*, 263 NLRB 515, 516 (1982), involving economic strikers, the Board stated:

[A]n employer may address the subject of striker replacement without fully detailing the protections enumerated in *Laidlaw*,<sup>5</sup> so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*. . . . [.] As long as an employer's statement on job status after a strike are consistent with the law, they cannot be characterized as restraining or coercing employees in the exercise of their rights under the Act.

In the instant matter, Toporovsky, Borukhovich, Straba, Patel, and others were engaged in an unfair labor practice strike. As the letter threatens them with possibly being permanently replaced it was an unlawful threat in violation of Section 8(a)(1) of the Act. *Trading Port, Inc.*, 219 NLRB 298 (1975); *Cagles, Inc.*, 234 NLRB 1148 (1978); *Syigma Network Corp.*, 317 NLRB 411 (1995); *Grinnel Fire Systems*, 328 NLRB 585

<sup>5</sup> *Laidlaw Corp.*, 171 NLRB 1366 (1968).

(1999).

Finally, it is alleged that since about June 7, after Toporovsky and Borukhovich made unconditional offers to return to work, the Respondent failed and refused to reinstate them to their former positions of employment by placing them on the second shift and by making changes to Toporovsky's working conditions, in violation of Section 8(a)(1) and (3) of the Act. The law is clear that once unfair labor practice strikers make unconditional offers to return to work, they must be returned to their former positions of employment, unless they no longer exist, even if permanent replacements must be discharged in order to do so. *Harlowe Servo Controls, Inc.*, 250 NLRB 958, 1070 (1980); *Super Glass Corp.*, 314 NLRB 596, 598 (1994). As the Respondent reinstated them to the second shift, rather than the first shift where they had previously been employed, it violated Section 8(a)(1) and (3) of the Act. Because of this finding, I need not decide whether it made any further changes to Toporovsky's terms of employment.

#### CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. By issuing written warnings to Jack Toporovsky on May 9 and 12, 2005, and by removing the laptop computer from his office and the telephones from the maintenance department on about May 10, 2005, the Respondent violated Section 8(a)(1) and (3) of the Act.
4. The strike engaged in by Toporovsky, Gregory Borukhovich, Karl Straba, Henry Patel, and other employees from May 24, 2005 to June 6, 2005 was an unfair labor practice strike.
5. The Respondent violated Section 8(a)(1) of the Act by threatening the unfair labor practice strikers with permanent replacement if they refused to abandon the strike.
6. Since on or about June 7, 2005, the Respondent has failed and refused to reinstate Toporovsky and Borukhovich to their former positions of employment.

#### THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act. Having found that the Respondent unlawfully gave Toporovsky two written warnings, I shall recommend that it be ordered to rescind these warnings, expunge them from his record, and notify him in writing that this has been done. I shall also recommend that the Respondent be ordered to return Toporovsky's computer to his desk, and the telephones to the maintenance department. Finally, I shall recommend that Toporovsky and Borukhovich be offered immediate reinstatement to the first shift position that they held prior to May 24, 2005. No affirmative remedy is required for Straba and Patel and, because I have recommended that Toporovsky and Borukhovich be reinstated to their former first-shift position, no af-

firmative remedy is needed to remedy the threat contained in the May 24, 2005 letter. Counsel for the General Counsel, in her brief, requests "special remedies," including access to the bulletin boards at the facility, the names and addresses of current employees, and the requirement that a representative of the Respondent read the notice herein to assembled employees. As the history that counsel for the General Counsel depends or relates to settled cases, I find that this request is not justified herein.

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

#### ORDER

The Respondent, Pennant Foods Company, a wholly owned subsidiary of CS Bakery Holdings, Inc., a wholly owned subsidiary of Chef Solution Holdings, LLC, North Haven, Connecticut, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Issuing warnings to employees, or otherwise discriminating against its employees, due to their union, or other protected concerted activities.

(b) Threatening unfair labor practice strikers with permanent replacement if they fail to return to work at a specific time.

(c) Failing and refusing to reinstate unfair labor practice strikers to their former positions of employment.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify Toporovsky, in writing, that the warnings issued to him on May 9 and May 12, 2005 have been withdrawn, and that evidence of these warnings will be expunged from its files.

(b) Replace the laptop computer that was taken from Toporovsky's desk and the telephones that were removed from the maintenance department.

(c) Reinstate Toporovsky and Borukhovich to the first-shift positions on which they had been employed prior to May 24, 2005.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful warnings given to Toporovsky, and within 3 days thereafter notify him, in writing, that this has been done and that the warnings will not be used against him in any way.

(e) Within 14 days after service by the Region, post at its facility in North Haven, Connecticut, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 34, after being

<sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>7</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 9, 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 19, 2006

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT issue warnings to, or otherwise discriminate against our employees, due to their union, or other protected concerted activities.

WE WILL NOT threaten unfair labor practice strikers with permanent replacement.

WE WILL NOT fail or refuse to reinstate unfair labor practice strikers to their former positions of employment.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL rescind the written warnings dated May 9 and 12, 2005 given to Jack Toporovsky and we will notify him, in writing, that this has been done and that all evidence of these warnings have been removed from our records.

WE WILL reinstate Toporovsky and Gregory Borukhovich to their positions of employment prior to May 24, 2005.

PENNANT FOODS COMPANY, A WHOLLY OWNED  
SUBSIDIARY OF CS BAKERY HOLDINGS, INC., A  
WHOLLY OWNED SUBSIDIARY OF CHEF SOLUTION  
HOLDINGS, LLC